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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

RAD REFERRAL: RR 09L-06
DATE REFERRED: February 20, 2009
DATE ACTIVATED: March 15, 2009

EXPIRATION OF SOL: July 17, 2012 –
November 4, 2013

SOURCE:

RAD REFERRAL

RESPONDENTS:

Cannon for Congress and
Lynn Gilbert, in her official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 441a(a)(1)
2 U.S.C. § 441a(a)(2)
2 U.S.C. § 441a(f)
11 C.F.R. § 102.9(e)
11 C.F.R. § 110.1(b)
11 C.F.R. § 110.1(k)(3)
11 C.F.R. § 110.2(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports
RAD Referral Materials

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This referral from the Reports Analysis Division ("RAD") involves \$113,996.50 in general election contributions accepted by Cannon for Congress and Lynn Gilbert, in her official capacity as treasurer ("the Committee"), the principal campaign committee of Chris Cannon, during the 2008 primary election. Chris Cannon served six terms in the House of Representatives, representing the 3rd Congressional District of Utah. On June 24, 2008, Cannon lost a Republican primary race to challenger Jason Chaffetz. The contributions identified in this

1 referral consist of \$113,996.50 that were designated for the 2008 general election, but that were
2 not redesignated, reattributed, or refunded within 60 days of the date of the primary loss. Of this
3 amount, \$75,300 in general election contributions became excessive after Cannon lost the
4 primary election. The Committee failed to refund or otherwise cure its excessive general election
5 contributions, because it spent almost all of its funds on the primary election.

6 As described below, we recommend that the Commission find reason to believe that
7 Cannon for Congress and Lynn Gilbert, in her official capacity as treasurer, violated 2 U.S.C.
8 § 441a(f) by knowingly accepting \$75,300 in contributions designated for the general election
9 from individuals and multicandidate committees that had already contributed the maximum
10 amount allowable for the 2008 primary election, which became excessive as of the date the
11 candidate lost the primary, and 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i) by
12 failing to refund, redesignate, or reattribute \$113,996.50 in contributions designated for the
13 general election, including \$38,696.50 in contributions designated for the general election from
14 contributors who did not contribute the maximum allowable for the 2008 primary election, [

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16 **II. FACTUAL SUMMARY**

17 Beginning in mid-2007 through mid-2008, the Committee reported general election
18 contributions from 20 individuals totaling \$20,996.50, 34 political action committees totaling
19 \$92,000, and one "communication cost group" (i.e., a trade association reporting communication
20 costs on FEC Form 7) totaling \$1,000. See RAD Referral dated Feb. 18, 2009 ("Referral"), at
21 Attachment 2. As noted above, Cannon lost the primary election on June 24, 2008. On October
22 16, 2008, RAD sent the Committee a Request for Additional Information ("RFAI") referencing

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1 the Committee's 2008 July Quarterly Report. *See* Referral at 2. The RFAI questioned the
2 Committee's receipt of impermissible general election contributions that were reported on
3 several of the Committee's 2007 and 2008 FEC Reports and requested that the Committee take
4 corrective action. *Id.* On November 14, 2008, the Committee filed an amended 2008 July
5 Quarterly Report, but the Amended Report failed to address the impermissible contributions
6 received for the general election. *Id.*

7 RAD had several discussions with Kimberley Williams, the assistant to the Committee's
8 treasurer, about the receipt of and failure to refund general election contributions. On January
9 15, 2009, RAD called Williams and inquired about the Committee's failure to take corrective
10 action in response to the RFAI. *Id.* at 2. Williams stated that she thought she had responded
11 adequately to the RFAI, but would take another look at the outstanding issues. *Id.* at 3. RAD
12 informed Williams that the Committee needed to take immediate action to refund the
13 contributions, and that the Committee should submit a response detailing its efforts to refund the
14 contributions by January 28, 2009 to avoid a referral for further action.

15 RAD then contacted Williams on January 27, 2009 regarding the status of the general
16 election contributions, and Williams told RAD that she had forwarded the issue to a colleague
17 and was awaiting an answer. *Id.* RAD reiterated that the Committee was required to refund the
18 contributions by January 28, 2009, and Williams said she would investigate the status of the
19 refunds and call the analyst back. *Id.* Later that day, Williams called RAD and stated that the
20 Committee was not cooperating with the treasurer, and that Williams was experiencing problems
21 getting in touch with the Committee. *Id.* at 3. RAD informed Williams that if the Committee
22 could prepare a statement by January 28, 2009 detailing the corrective action being taken by the

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1 Committee, RAD would take this statement into consideration. *Id.* Williams stated that the
2 Committee would do so, and gave RAD the contact information for the Committee's campaign
3 manager, Joe Hunter. *Id.* RAD then called and left a message for Hunter regarding the
4 Committee's failure to refund the general election contributions, but Hunter has not responded as
5 of the date of this report. *Id.*

6 On January 28, 2009, RAD contacted Williams and informed her that it would refer the
7 Committee for further action by the Commission. *Id.* Williams apologized for not having taken
8 action sooner and stated that the Committee would fully cooperate with the referral process. *Id.*¹

9 **III. LEGAL ANALYSIS**

10 The Committee accepted \$113,996.50 in contributions from individuals and
11 multicandidate political action committees ("PACs") that were designated for the 2008 general
12 election. Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an
13 individual may not make a contribution to a candidate in excess of the limits at 2 U.S.C.
14 § 441a(a)(1)(A) and 11 C.F.R. § 110.1(b)(1), set at \$2,300 per election during the 2008 election
15 cycle, and multicandidate political action committees may not make contributions in excess of
16 \$5,000 per election. *See* 2 U.S.C. § 441a(a)(2)(A). Candidates and political committees are
17 prohibited from knowingly accepting contributions in excess of the limitations in section 441a.
18 *See* 2 U.S.C. § 441a(f). A primary election, general election, runoff election, and special election
19 are all considered an "election" under the Act, *see* 2 U.S.C. § 431(1)(A); 11 C.F.R. § 100.2, and
20 contribution limits are applied separately with respect to each election. *See* 11 C.F.R. § 110.1(j).

¹ In accordance with the Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38,617 (Aug. 4, 2009), the Office of General Counsel sent a pre-RTB letter to the Respondents on August 7, 2009, which included the RAD Referral document. However, we received no response from the Respondents.

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1 "If a candidate fails to qualify for the general election, any contributions designated for the
2 general election that have been received from contributors who have already reached their
3 contribution limit for the primary election would exceed FECA's contribution limits." AO 2007-
4 03 (Obama) at 3.

5 The Commission's regulations permit a committee to accept contributions for the general
6 election prior to the primary election, but the committee must employ an acceptable accounting
7 method to distinguish between primary and general election contributions. See 11 C.F.R.
8 § 102.9(e)(1). An authorized committee's records must demonstrate that prior to the primary
9 election, the committee's recorded cash on hand was at all times equal to or in excess of the sum
10 of general election contributions received less the sum of general election disbursements made.
11 See 11 C.F.R. § 102.9(e)(2). If, however, the candidate loses the primary election and does not
12 otherwise run in the general election, the committee must, within 60 days: (1) refund the
13 contributions designated for the general election; (2) redesignate such contributions in
14 accordance with 11 C.F.R. §§ 110.1(b)(5) or 110.2(b)(5); or (3) reattribute such contributions in
15 accordance with 11 C.F.R. § 110.1(k)(3). See 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i),
16 110.2(b)(3)(i).

17 Because a committee does not have actual notice of the need to obtain redesignations
18 until the results of the primary are known, if a candidate loses the primary election but has
19 accepted a contribution designated for the general election before the primary, the committee has
20 60 days from the date of the primary election to refund, redesignate, or reattribute such
21 contribution. See AO 1992-15 (Russo for Congress Committee) at 2; see also *The Campaign*
22 *Guide for Congressional Candidate and Committees* (April 2008) at 18. After a primary loss,

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1 contributors no longer have a separate contribution limit for the general election. AO 2003-18
2 (Smith) at 3, AO 1986-17 (Green) at 4. Redesignation of general election contributions may only
3 occur to the extent that the amount redesignated does not exceed the contributor's contribution
4 limit for the primary and the amounts redesignated do not exceed the net debts outstanding from
5 the primary. *See* 11 C.F.R. §§ 110.1(b)(5)(iii) and (b)(3)(i), 110.2(b)(5)(iii) and (b)(3)(i); *see*
6 *also* AO 1992-15 at 2. A committee's net debts outstanding are calculated, in relevant part,
7 based on the total amount of debts and obligations incurred for an election, less the total cash on
8 hand available to pay the debts and obligations, and any amounts owed to the committee.
9 11 C.F.R. § 110.1(b)(3)(ii). If a committee deposits contributions that exceed its net debts
10 outstanding, it must, within 60 days of accepting the excessive contributions, refund, redesignate,
11 or reattribute the excessive contributions. 11 C.F.R. §§ 110.1(b)(3)(i), 110.2(b)(3)(i), *see also*
12 11 C.F.R. §§ 110.1(b)(5) and 110.1(k)(3). Likewise, reattribution of a general election
13 contribution may only occur to the extent that such attribution does not exceed the contributor's
14 contribution limits. *See* 11 C.F.R. § 110.1(k)(3)(ii)(B)(1); *see also* AO 2007-03 (Obama) at 3.

15 In this case, the Committee accepted contributions totaling \$113,596.50 that were
16 designated for the 2008 general election, but that were not redesignated, reattributed or refunded
17 within 60 days after the candidate's primary loss. *See* 11 C.F.R. § 102.9(e)(3). Of this amount, it
18 appears that the Committee accepted \$75,300 in contributions from individuals and
19 multicandidate political action committees ("PACs") that had already contributed the maximum
20 amount allowable for the primary election, and therefore these contributions designated for the
21 general election became excessive when the candidate lost the primary. *See* 11 C.F.R.
22 § 102.9(e); *see also* AO 2007-03 (Obama) at 3. The Committee could not redesignate these

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1 general election contributions to the 2008 primary election because the contributors had already
2 contributed the maximum amount allowable for the primary election. Moreover, reattribution of
3 the Committee's general election contributions would not remedy the Committee's acceptance of
4 a contribution designated for an election in which Cannon was not participating. See 11 C.F.R.
5 § 110.1(k)(3). The remaining amount, \$38,696.50, came from individuals and PACs that did not
6 contribute the maximum amount allowable for the primary election, but which was not
7 redesignated, reattributed, or refunded as required under 11 C.F.R. § 102.9(e).² Also, according
8 to disclosure reports, the Committee spent nearly all of its money on the primary election and,
9 thus, did not have sufficient funds to make the necessary refunds.³

10 Based upon the foregoing, we recommend that the Commission find reason to believe
11 that Cannon for Congress and Lynn Gilbert, in her official capacity as treasurer, violated
12 2 U.S.C. § 441a(f) by knowingly accepting \$75,300 in contributions designated for the general
13 election from individuals and multicandidate committees that had already contributed the
14 maximum amount allowable for the 2008 primary election, which became excessive as of the
15 date the candidate lost the primary, and 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), and
16 110.2(b)(3)(i) by failing to refund, redesignate, or reattribute \$113,996.50 in contributions
17 designated for the general election, including \$38,696.50 in contributions designated for the
18 general election from contributors who did not contribute the maximum allowable for the 2008

² Most of the individuals and PACs only made contributions for the 2008 general election. One PAC, DIRECTV Group Inc. Fund, contributed \$4,000 for the 2008 primary election and \$2,500 for the 2008 general election. Therefore, \$1,500 of the DIRECTV contribution designated for the general election became excessive as of the date Cannon lost the primary, and the remaining \$1,000 should have been refunded, redesignated, or reattributed in accordance with 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i).

³ The Committee reported \$3,455.68 in cash on hand in its 2008 October Quarterly Report and \$2,572.27 cash on hand in its 2008 Year End Report.

1 primary election.

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3 This Office believes that a formal investigation is not required to establish the facts

4 described in this Report.

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12 **V. RECOMMENDATIONS**

13 1. Open a MUR in RAD Referral 09L-06;

14 2. Find reason to believe that Cannon for Congress and Lynn Gilbert, in her official
15 capacity as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. §§ 102.9(e)(3),
16 110.1(b)(3)(i), and 110.2(b)(3)(i);

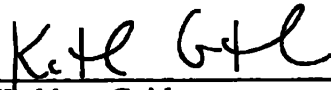
17 3. Enter into pre-probable cause conciliation with Cannon for Congress and Lynn
18 Gilbert, in her official capacity as treasurer, prior to a finding of probable cause to
19 believe;

4. Approve the attached proposed Conciliation Agreement;
5. Approve the attached Factual and Legal Analysis; and
6. Approve the appropriate letters.

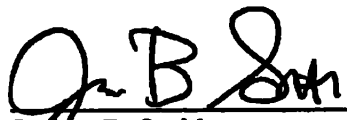
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